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ABSTRACT

The Supreme Court tentatively extended First Amendment protection to commercial speech, but left the issue of defining and regulating deceptive advertising to the Federal Trade Commission (FTC), which has employed tools such as the cease-and-desist order, affirmative disclosure, and corrective advertising. The FTC Act did not define deception, but the commission generally holds that deception exists "when an objectively ascertainable material fact is presented falsely, is ambiguous, or is misleading." Deception has been modeled, by Armstrong and Russ (1975), as a process involving exposure, perception, and belief. This implies that in order for deception to occur, it is not sufficient that claims be false; they must also be believed. The commissioners are not justified in acting on the basis of this model, because if they believe an ad to be deceptive they have not been deceived. Furthermore, they cannot interpret the beliefs of consumers solely on the basis of their own beliefs. Though research has not been able to define deception, it has developed techniques for detecting deception, two of which are the "normative belief technique" and the "salient belief technique." However, research has not been able to establish causality and thus has had little impact on policy, except in the case of "puffery," which is currently considered protected speech but may deserve the same consideration that deception is currently given by the law. Seventy-eight end notes are appended. (SRT)

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DECEPTIVE ADVERTISING: UNPROTECTED AND UNKNOWN

by: Robert Hal Ducoffe

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ABSTRACT

DECEPTIVE ADVERTISING: UNPROTECTED AND UNKNOWN

The Supreme Court has left the determination of what is "deceptive advertising" to the Federal Trade Commission. The Court's failure to make an authoritative statement on the subject has led to an uncertain regulatory environment. This failure is attributed to the difficulty in defining deception. This paper discusses the work of behavioral researchers who have studied deception and suggests that more comprehensive research is necessary to aid policy-makers.

The Supreme Court's "strings-attached" extension of First Amendment protection to commercial speech has left both advertisers and regulators in a perpetual "tug-of-war" over their respective rights to determine the public good. Its tentative recognition that commercial speech deserves First Amendment protection is reflected by the limited and inconsistent nature of its decisions to date. As to its treatment of deceptive advertising, the Court, while clearly stating it deserves no protection, has all but deferred to the "expertise" of the Federal Trade Commission to enforce and set policy in this area. For most of its history, the FTC has relied on the intuitive judgment of its five commissioners, rather than on empirical grounds for identifying deception. Though the Commission is increasingly employing the testimony of consumers and scientific surveys,(1) the judges have stated pointedly that they use such evidence merely to corroborate their own similar judgments made independently.(2)

What remains is a regulatory environment characterized by uncertainty. The Supreme Court has retreated from taking an authoritative stance and, in the wake of that retreat, has left decisions which may have First Amendment implications in the hands of a commission more responsive to political tides than to the intentions of the framers of the constitution.

Much of the uncertainty stems from the failure of both the Supreme Court and the FTC to come up with a satisfactory definition of deception. This paper will address this issue by reviewing the findings of researchers who have studied deception

while suggesting the implications that these findings may have on how deception is understood. The following section outlines the Court's thinking on deception, which, in spite of changes in commercial speech doctrine, has remained unchanged and unfinished.

DECEPTION IN A CHANGING COMMERCIAL SPEECH-FIRST AMENDMENT CONTEXT

The tainted heritage of commercial speech under the First Amendment was expressed in the 1941 dissent of Judge Jerome Frank in Valentine v. Chrestensen.(3) "Such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising."(4) This view was expressed when the case reached the Supreme Court in 1942(5) when New York City's right to keep its streets clean by forbidding commercial leafletting was upheld. This decision separated commercial speech from other forms of protected expression on the basis of its "mercantile nature".(6)

The Court's understanding underwent a significant transformation thirty-three years later when in 1975, in Bigelow v. Virginia, the fact that an advertisement could contain information of social value was recognized.(7) A Virginia newspaper was convicted for running an ad for an abortion referral service in New York because abortions were illegal in Virginia. The Supreme Court reversed and in Justice Blackmun's opinion, stated that "the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas," (8) which led to a clarification of the declaration in Chrestensen

as not to be interpreted as supporting "any sweeping proposition that advertising is unprotected per se."(9)

Only a year later, a consumer group's challenge to a ban on advertising by pharmacists led to a formulation of commercial speech doctrine which, in principle, stands today. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,(10) the protection previously afforded an advertisement concerning a public issue was extended to one including only price information. The Court went so far as to say that the consumer's interest in the free flow of commercial information "may be keen, if not keener by far, than his interest in the day's most urgent political debate." (11) In lieu of this opinion, the Court remained wary of regarding commercial speech as completely undifferentiable from other forms, pointing out that differences were "commonsense",(12) and that some forms of regulation were permissable.(13) Specifically, the Court referred to false or misleading advertisements, explaining that "untruthful speech, commercial or otherwise, has never been protected for its own sake,(14) relying on Gertz v. Robert Welch.(15) This was the "fork-in-the-road", with one path leading toward protection and the other toward regulation. Deception was sent down the road to regulation and as the unburdened Court explained, "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem."(16)

This "out of sight, out of mind" attitude toward deceptive advertising remained unchanged in the Court's most comprehensive

analysis of the First Amendment status of commercial speech to date. In 1980, in Central Hudson Gas & Electric v. Public Service Commission of New York,(17) a four-part test for determining whether, and under what conditions, protection would accrue to commercial speech was introduced: "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than necessary to serve that interest."(18)

As the Court endeavored to fine tune the limitations on commercial speech it deemed necessary, again, as in Virginia Board, it tersely dismissed deceptive advertising from First Amendment protection. Not only did confirmation of deceptive advertising's exile fail to elicit elaboration in the Court's opinion, the maturing commercial speech doctrine, itself, expressed a fundamental tension by maintaining there was a government interest in regulating content. The basic First Amendment principle states "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."(19) Farber points out that advertising regulation violates this principle in that "the content of the advertisement is generally the source of the government's objection, and the commercial subject matter of the advertisement forms the basis of the government's claim to regulatory power."(20)

The limited protection that commercial speech has been given

is borne out by inconsistent case decisions. On one hand, certain product and service providers now have the right to advertise, including those who display outdoor "For Sale" signs,(21) lawyers,(22) contraceptive manufacturers,(23) clinical health laboratories,(24) corporations conducting advocacy advertising campaigns,(25) and those who manufacture and distribute gasoline.(26) On the other hand, the doctrine limits the manner in which certain advertising can be done. In Ohralik v. Ohio State Bar Association, "in-person solicitation" by lawyers was considered an inappropriate form of legal solicitation.(27) This was followed by the Court's decision that a brand name could not be used used by a chain of optometry retailers in advertisements because it could too easily deceive consumers as to the characteristics of their services.(28)

While the Court's method of deciding these cases can be questioned, certain restrictions on commercial speech are more easily justified. Examples include advertising of illegal products or services, or obscenity. In Pittsburgh Press v. Pittsburgh Commission on Human Relations, the inclusion of employment advertising in a sexually discriminatory manner rendered it unprotected, because discrimination in employment is illegal.(29) Obscene advertising,(30) as well as advertising which invades the privacy of individuals for commercial purposes,(31) are other examples of unprotected commercial speech.

In summary, the Supreme Court's tentative extension of First Amendment protection to commercial speech has given some expression protection, some partial protection, some no

protection, and left deceptive advertising in someone else's back yard to clean up. The backyard belongs to the Federal Trade Commission which the Court has held, "...is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the Court will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."(32) The next section discusses how the FTC has dealt with this responsibility.

THE FEDERAL TRADE COMMISSION AND DECEPTION

There are several governmental agencies which are concerned with the content and nature of advertising messages, including the Federal Communications Commission, the Consumer Product Safety Commission, the Food and Drug Administration, the Postal Service, the Securities and Exchange Commission, the Internal Revenue Service, and the FTC. All, with the exception of the FTC, have fairly specific and limited interests in the field of advertising regulation.(33)

An act of Congress created the FTC in 1914, with the purpose of preventing "unfair methods of competition in commerce."(34) In 1938, the Commission's powers were broadened by the Wheeler-Lea Amendments to the FTC Act which was expanded to read, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce..."(35) From that time on, the Commission has expressly concerned itself with sellers' misrepresentations (36) in its role to promote consumer interests.

The FTC has employed a number of tools in its role. Among them are the cease-and-desist order, affirmative disclosure and corrective advertising. Though each may be questioned in view of the First Amendment status accorded advertising, they are predicated on the Commission's prior determination of deception and so emphasis will be focused on the latter.

The Federal Trade Commission Act does not define deception, (37) which has given the Commission considerable latitude in its determinations. It has generally held that deception exists "when an objectively ascertainable material fact is presented falsely, is ambiguous, or is misleading."(38) This broad definition leaves the FTC to consider potentially competing interests,(39) which involve balancing protection of the consumer(40) and competition within the marketplace,(41) against the advertiser's interest in the free flow of information.(42)

In considering these interests, the Commission has only to show that an advertisement may have "the capacity to deceive,"(43) and has made its evaluations by attempting to interpret the ad's total impression on the consumer.(44)

The FTC's authority to regulate deception has undergone change resulting from revisions to the Act which created it, as well as in response to the changes in the political and social environment. From its inception in 1914, until the 1960s, the FTC's cease-and-desist order was issued an average of seventy times per year.(45) In the 1970s, its role came under criticism as ineffective because of its mandate to patrol the entire American economy with a limited budget. Some felt that the chance of

detection and prosecution of deceptive practices was extremely slim.(46) Responding to consumerist pressure for change, Nixon and the Congress supported changes in the Commission as well as significant budget increases.(47)

A revitalized Commission advanced new proposals on advertising substantiation,(48) comparative advertising,(49) affirmative disclosure,(50) advertising to children,(51) and advertising code barriers.(52) During this period, as well, the FTC began to investigate more subtle forms of deception involving claims which were literally true, though which falsely implied unique qualities.(53)

As the Commission asserted itself, a change in the ideological orientation in the White House in tandem with a backlash from the business community, left its ability to prosecute deceptive practices constrained by new legislative restrictions. A recent majority of the Commission has replaced the deception standard it has applied for forty years holding an ad claim to be unlawful if "it has the tendency or capacity to deceive a substantial number of consumers in a material way," with a more stringent test which recognizes deception only when "a claim is material and likely to mislead consumers acting reasonably under the circumstances."(54) By raising the evidentiary level, many feel this will weaken the Commission's regulatory role.

As the FTC's role drifts with the ebb and flow of the political tide, so too has its means for determining what is deceptive. Brandt and Preston's census of FTC decisions shows the

Commission making increasing use of external evidence (consumer testimony and scientific surveys), but Cohen notes, that even here, there are inconsistencies in the use of such evidence.(55)

A CONSUMER PERSPECTIVE ON DECEPTION

The potential which exists for improving the current treatment of deception by the law lies in developing a better understanding of how deception "affects" consumers. It seems that this lack of understanding is at the root of its deficiency. This does not suggest that the Supreme Court and concerned regulators have not considered the consumer in their decisions, rather that such consideration involves predicting human behavior, a process fraught with complexity. Unfortunately, the present legal approach has side-stepped the issue by focusing on the act of deceiving by the advertiser, rather than the effect of the message on the consumer.(56) Though knowledge of deception's effect on consumers is by no means complete, herein lies the gap that researchers can most suitably fill. Even with perfect understanding of consumer behavior, the research role will necessarily remain one of supplying valid empirical data. Ultimately, consideration of the legal approach rests with the Supreme Court charged with the responsibility of defining standards designed to achieve an optimal balance between the "clean flow and free flow"(57) of commercial expression.

Research has attempted to understand consumer responses to deception by studying the way people "process information". Within this general conceptual framework, several researchers have

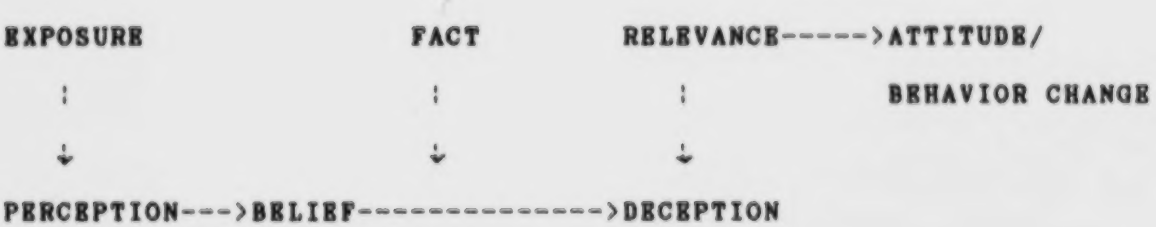
advanced definitions of deception and techniques for its measurement. These are discussed following a brief explanation of a general behavioral model in the next section.

A PROCESS MODEL FOR DECEPTION

The model of the deception process presented here was advanced by Armstrong and Russ in 1975.(58) It is represented schematically below.

Figure 1

The Deception Process



The deception process begins with an individual's exposure to the advertisement. It continues when the individual perceives the message to be making either an implied or express claim. If the implied or express claim is false or misleading, the advertisement is potentially misleading. (Note that it is at this point that the FTC establishes whether a message is deceptive or not.) The model suggests, however, that in order for deception to occur, it is not sufficient that claims be false. They must also be believed. "Thus, deception occurs when a consumer believes in a claim that is actually false."(59) In linking the false belief

with a change in attitude or behavior, the model suggests that the deceptive advertisement must be relevant to the individual who perceives it. In order, then, to arrive at a complete understanding of deception, it is necessary to consider the entire process from exposure to behavior change. Though the model is oversimplified, it raises issues at each stage in the process which have implications for both research and policy.

The most obvious implication is that the FTC uses an incomplete means of determining deception. Deciding whether an ad is deceptive on the basis of how the commissioners themselves perceive it is clearly insufficient. The idea that the commissioners go further than perception by determining whether or not they "believe" a message is deceiving is unjustifiable for two reasons. First, if the commissioners believe an ad to be deceptive, they, in fact, haven't been deceived by it. Secondly, the commissioners cannot be expected to interpret the beliefs of consumers solely on the basis of their own beliefs, even given their status as "experts" as designated them by the Supreme Court. The subjective nature of beliefs make this an impossible task.

The second major implication of the model is the need to employ empirical research in order to determine the beliefs of consumers and whether, on the basis of the results, an ad should be considered deceptive. Again, it is important to understand that accepting a role for research does not absolve policy makers from having to make the ultimate determination. Research only supplies better evidence on which presumably better decisions can be made.

The model suggests a number of additional issues, as well.

Since the deception process originates with exposure, the medium in which a message appears usually affects how people perceive it. That is, the same message in different media may not be equally deceiving in each. There is also the "exposure situation". For example, certain situational factors determine the type of response a message is likely to elicit. Yelling "FIRE" in a theater, or offering legal services in an emergency ward, are instances where the situational context of a message poses potentially grave consequences. Another issue is relevance. A deceptive message which is not relevant to anyone is equally unlikely to deceive them. The issue, then, lies in determining which consumers are the target of the message and how many are likely to be deceived. Not only does this suggest that a potentially deceptive message must be measured against individuals likely to be concerned with it, but also on the characteristics of certain groups which may make them more or less apt to be deceived. The FTC's recognition of this led to its attempt to outlaw some advertising to children. There are also issues concerning the behavior commonly associated with different kinds of purchases and products. Low involvement purchases (like toothpaste or bathroom tissue) may be more easily influenced by a deceptive advertisement than high involvement purchases (like a car or a house) because the ad plays a greater role in the purchase decision(60). Still another issue is the potential consequences of deceptive advertising for certain products. For pharmaceuticals, the negative consequences of deception may be more serious.

Though this is only a sampling of the issues raised by defining deception as a complete process, it suggests that the Supreme Court and the FTC need consider more than just their perceptions of advertisements in developing adequate regulatory standards. Research into deception has usually been limited to assessing the means for evaluating "truth" in advertisements. While numerous additional questions remain, there is some empirical evidence questioning deception's current treatment by the law. The next section reviews how researchers have defined deception, thus far, and the methods they've employed in doing so.

DEFINITION AND MEASUREMENT OF DECEPTION

The desire to develop a standard definition of deception has motivated a number of studies. Though it is agreed that a standard procedure for detecting advertising deception is a desirable goal,(61) it is not yet possible in view of the level of current understanding.(62)

Previous attempts at definition have focused on either consumer perceptions of what they consider to be deceiving,(63) or on the cognitive effects which deceptive advertisements have.(64) Surveying consumer perceptions by asking them whether they consider an ad deceiving is criticized on the basis that once someone is able to detect the presence of deception (as referred to with respect to the way the FTC commissioners operate), they have not been deceived by it.(65) The generally accepted framework and the one which underlies the model discussed in this paper, is the approach which defines deception in terms of consumer

information processing.(66) That is, deceptive ads will measurably affect the attitudes individuals have of specific product attributes. In this view, an advertisement may contain a number of potentially deceiving elements. There may be explicit claims of product performance or non-verbal features such as pictures, illustrations or symbols.(67) Cohen discussed a number of both verbal and non-verbal elements which she terms "surrogate indicators". These are used by consumers to make buying decisions in place of other evaluative criteria.(68) Surrogate indicators like colors or symbols (brand names are a good example), have the potential to impart deceptive images when consumers depend on them as cues to evaluate products.

It is evident that a clear definition of deception remains elusive to researchers as well. Studies have demonstrated the multiple ways in which advertisements can deceive, but as yet the concept can't be pinned down long enough for anyone to grasp it. There are definitely more questions than answers. If research has not been able to solve the definitional dilemma, it has at least developed techniques which make it possible to detect deception with a measurable degree of certainty.

Two distinct measurement approaches have been identified:(69) the "normative belief technique" which was first advocated by Gardner,(70) and the "salient belief technique" described by Armstrong and Russ.(71) Each uses a different standard against which a potentially deceptive message can be evaluated. The normative belief technique employs a set of attribute beliefs held by a representative group of knowledgeable consumers. When an

advertisement for a particular product is exposed to a subject who is then found to have significantly more favorable beliefs about it than those held by the representative group, the ad is considered deceptive. Providing that the beliefs used to establish the norm are not flawed (which would be possible if all the advertising in the product category were deceptive), or that the ad reflected a unique and distinctly different claim which was true (in which case the norm would be an unfair standard), this technique is reliable.

It is unnecessary to use a normative standard when judgments of truth can be made externally. Salient belief technique adopts this approach. In this type of study, the beliefs of respondents are compared to objective verifiable information concerning product make-up or performance specifications. If exposure to an ad leaves a subject with a belief which is false in lieu of the actual characteristics of the product, it is considered deceptive. The previous technique is more suited to evaluating claims which involve value judgments. One or the other method will be appropriate for determining whether an advertisement is likely to be deceptive.

Unfortunately, both of these techniques are limited to generating evidence as to the likelihood that a message will deceive a group of relevant consumers. As we have seen from the previous discussion, deception is a process extending from exposure through to behavior. Research in this area, and behavioral research in general, would be hard-pressed to find examples where causality can be established with any certainty.

This fact may limit the possibility that research in this area will have broad policy implications in the near future. There is, however, one area where empirical evidence may lead to changes in the law. That area is "puffery".

PUFFERY: QUESTIONABLE PROTECTION

To "puff" is to "blow-up, exaggerate, over-state, or state superlatives concerning matters of subjective judgment and opinion in the assessment of taste, beauty, pleasure, popularity, durability and similar qualities."(72) Puffery is regarded as expression of the seller's opinion only and of more or less indefinite content.(73) The law has permitted puffery statements on the grounds they have no precise meaning, that they differ from person to person, and that reasonable consumers don't rely on them.(74) Research data now appears capable of refuting this rationale.

The argument made is that, "...although it states no facts literally, puffery conveys facts by implication, that these facts are false, that puffery thus deceives a substantial portion of the public by implication, and that such claims, therefore, should be prohibited."(75)

Puffery's non-literal nature makes drawing conclusions as to how the average consumer will perceive it difficlult. This implies (and, as a pragmatic matter, virtually requires) the use of empirical research.(76) Research on puffery claims has demonstated that it not only communicates opinions, but facts as well.(77) Those who've measured whether there is a difference

between people's beliefs in factual claims and puffery claims have found that no difference exists.(78) This is fairly conclusive evidence that puffery, though currently considered protected speech, may deserve the same consideration that deception is currently given by the law.

CONCLUSION

While this paper has pointed to the inconsistencies in the Supreme Court's treatment of commercial speech, and to its disregard for deceptive advertising, it has also shown that any expectations that researchers may have that their work will lead to a change in the current law concerning deception are currently remote.

In view of this, it also seems unlikely that a more definitive statement on deception will be forthcoming. As the theoretical model discussed in this paper suggests, deception is the result of a multistage causal process. At the current time, those who have considered the issue from a legal standpoint, as well as from an empirical one, seem stuck in a morass at the preliminary stages of the deception chain.

Lacking a better alternative, the FTC will probably remain the Supreme Court's designated "experts" on a subject where no experts appear to exist. On a more positive note, the techniques researchers currently employ, and others which will inevitably be developed, hold promise that our understanding of this phenomenon will continue to improve over time. Puffery is one such example.

Since no standards for deception are in the offing, a little

of the caveat emptor tradition lives on. Those who know it when they see it may derive some solace. For the rest of us, our day in court has yet to come.

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25. First National Bank v. Belotti, 435 U.S. 765 (1978).

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33. Mark Johnson, "The Federal Trade Commission: An Evolution in Social Engineering," Communications and the Law, 1 (Summer 1979):48.

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39. Welti, "The Need for a Statutory Definition of 'Deceptive' Advertising," p. 28.

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41. FTC v. Mary Carter Paint Co., 382 U.S. 46, 47 (1965).

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